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In the Supreme Court of the United States

OCTOBER TERM, 1968

JOHN A. METHEANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

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Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1363

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 390 F.2d 559.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1968. A petition for a rehearing was denied on March 28, 1968. The petition for a writ of certiorari was filed on April 26, 1968. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after petitioner had been acquitted of a charge of concealment of assets from a bankrupt estate, the government was precluded by the doctrine of collateral estoppel from introducing evidence concerning the mishandling of these assets by petitioner, where that evidence was admitted for the limited purpose of proving motive at petitioner's trial for perjury arising out of his testimony in the bankruptcy proceedings.

STATUTE INVOLVED

18 U.S.C. 152 is set out in full in the petition for certiorari (pp. 2-3).

STATEMENT

1. After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of three counts of perjury, arising out of a bankruptcy proceeding, in violation of 18 U.S.C. 152. On July 20, 1967, he was sentenced to two years' imprisonment on each count, the sentences to run concurrently.

In September 1962, petitioner had been indicted on one count charging concealment of assets in bankruptcy and four counts of perjury arising out of his testimony in the bankruptcy proceedings. He was indicted with a co-defendant who was charged with concealment of other assets. In March 1964, petitioner

and his co-defendant were convicted on all counts by a jury. In August 1966, the court of appeals reversed the conviction on the ground of improper joinder, finding that the offenses charged against petitioner and his co-defendant were distinct and separate and not part of the same transaction. *Metheany* v. *United States*, 365 F.2d 90 (C.A. 9).

Prior to the new trial, the concealment of assets count was severed, on petitioner's motion, from the four perjury counts. Petitioner was then tried first on the concealment count, and found not guilty by a jury. Petitioner was subsequently convicted, after another jury trial, on three of the four perjury counts (Counts III, IV and VI). The court of appeals affirmed (Pet. App. 8).

2. Petitioner served as attorney for Quality Upholstery, Inc., prior to its filing a petition in bankruptcy in June 1960 (Tr. 267, 269). Albert L. Sandoval was president of the company until April 1960, but was inactive in the running of the business (Tr. 23, 267). On April 29, 1960, at a meeting of stockholders, Sandoval was informed that there were some bills of the corporation, tax liens and salaries of employees which had not been paid (Tr. 26, 270-271). There were also checks which had been returned because of insufficient funds in the corporate bank account (Tr. 270-271). In order to protect his good name, Sandoval gave petitioner a check in the sum of $5800 to be used for the purpose of paying various creditors of Quality Upholstery (Tr. 61-62, 271). Petitioner sent Sandoval an accounting of the disbursement of these funds which recited that some of

the monies was disbursed to four concerns (Tr. 31-32). These four concerns did not actually exist and were not creditors of Quality Upholstery (Tr. 198-200). On December 10, 1961, nearly a year and one half after the bankruptcy proceeding had been instituted, petitioner returned the amount allegedly paid to two of these concerns to Sandoval (Tr. 34-37). This transaction was the basis of the charge of concealment of assets against petitioner. Petitioner contended that he held the funds which he had received from Sandoval in trust for Sandoval and not on behalf of the bankrupt estate (Tr. 290). He also denied receiving any funds from the checks made out to the fictitious payees (Tr. 278).

3. At the filing of the petition in bankruptcy by Quality Upholstery on June 17, 1960, the attorney for the bankrupt was Ira J. Bergman, who had been asked to serve in this capacity by petitioner (Tr. 68-72). A receiver was appointed to act on behalf of the bankrupt and in that capacity he received information that Sandoval had advanced funds to petitioner to be disbursed on behalf of Quality Upholstery. He unsuccessfully endeavored to obtain the cancelled checks relating to the transactions (Tr. 77-79). Subsequently, he filed a petition in the bankruptcy court for a turnover hearing which was held on January 29, 1962. Petitioner's testimony at that hearing formed the basis of the four counts of perjury (Tr. 80). These counts charged that petitioner knowingly testified falsely at the bankruptcy hearing that he: 1) had ceased to act as attorney for Quality Uphol-

stery on March 1, 1960, when in fact he served in that capacity until June 1, 1960 (Count III); 2) had only hearsay knowledge as to who had succeeded him as attorney for Quality Upholstery, when in fact he had personally requested Ira J. Bergman to serve in that capacity (Count IV); 3) had no records of the bankrupt in his possession when in fact he had the cancelled checks in his possession (Count V); and 4) did not know to whom Sandoval had sold his stock in the corporation when in fact he had personally handled the transaction (Count VI).

At the trial on the four perjury counts, evidence concerning the handling of the monies entrusted to petitioner by Sandoval was introduced to prove the motive for petitioner's testifying falsely at the bankruptcy hearing. Counsel for the government, both in his opening statement and his closing argument, emphasized the limited purpose for which this evidence was introduced (Tr. 12, 17, 247, 372). The trial court also stressed the limited purpose for which this evidence was admitted in its charge to the jury (Tr. 384). Petitioner's counsel twice informed the jury that petitioner had been acquitted of the concealment of assets charge (Tr. 207, 355).

ARGUMENT

Petitioner's argument that the government should have been collaterally estopped from introducing evidence concerning petitioner's mishandling of the funds entrusted to him in order to prove his motive for committing perjury is without merit. Petitioner's

acquittal of the concealment of assets charge did not amount to a finding of fact that mishandling of funds entrusted to him by Sandoval had not occurred. Rather, the verdict amounted at most to a finding that assets of the bankrupt corporation had not been concealed from the receiver. The jury at the first trial could, with good reason, have believed that petitioner tried to defraud Sandoval personally, rather than the bankrupt estate. Before the doctrine of collateral estoppel can be invoked it must appear that the factual issue was "necessarily determined" at the former trial, *United States* v. *Feinberg*, 383 F.2d 60 (C.A. 2), certiorari denied, 389 U.S. 1044; *Adams* v. *United States*, 287 F.2d 701, 704-705 (C.A. 5); see also *Abbate* v. *United States*, 359 U.S. 187, 200 n. 4 (opinion of Mr. Justice Brennan); *Hoag* v. *New Jersey*, 356 U.S. 464, 471.[1]

Petitioner's mishandling of the funds, even if they were personal funds of Sandoval, would show a motive to lie in the bankruptcy turnover proceedings. The evidence was thus properly admitted for this purpose. See *Reed* v. *United States*, 364 F.2d 630, 633 (C.A. 9), certiorari denied, 386 U.S. 918. The lim-

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[1] As the court below properly pointed out (Pet. App. 8), petitioner's reliance on *United States* v. *Kramer*, 289 F.2d 909 (C.A. 2), and *United States* v. *De Angelo*, 138 F.2d 466 (C.A. 3), is misplaced. In both those cases the defendants were acquitted of a charge of burglary or robbery and evidence of the burglary or robbery was introduced at a subsequent trial of conspiracy to commit the same burglary or robbery. Accordingly, the decision below, contrary to petitioner's contention (Pet. 4-5), in no respect presents a conflict with those holdings.

ited purpose for which the evidence was admitted was repeatedly emphasized by both government counsel and the trial court. Moreover, defendant's counsel informed the jury that petitioner had been acquitted on the concealment of assets charge. Since the evidence was properly introduced, it is inconsequential that it might have "influenced" the jury (see Pet. 4; Pet. App. 7).

That the jury understood the instructions and followed them can be seen by its acquittal of petitioner on Count V of the indictment. This count charged that petitioner testified falsely when he said that he had no records of the bankrupt corporation whereas he had the cancelled checks from the disbursement of the funds entrusted to him by Sandoval. Evidently, the jury believed that these checks were not records of the bankrupt because the money entrusted to petitioner belonged to Sandoval and not to the bankrupt. That belief is of course wholly consistent with the theory on which the perjury prosecution was based and with the limited purpose for which the challenged evidence was "offered, admitted and considered" (Pet. App. 8).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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